SYED ALI BIN SYED ABDUL HAMID & ANOR. v. PUBLIC PROSECUTOR

[F.C. (Raja Azlan Shah C.J. (Malaya), Salleh Abas & Abdul Hamid F.JJ.) September 21 & 25, 1981]

[Kuala Lumpur — Federal Court Criminal Appeal No. 15 of 1981]

Criminal Law and Procedure — Charge of trafficking in opium — Statutory presumptions — Not applicable — Whether circumstances show accused had necessary knowledge of opium to constitute possession — False statement made by accused — Dangerous Drugs Act, 1952, ss. 37 & 37B.

In this case the Customs Authorities stopped a car driven by the first appellant. The second appellant was seating in the front seat next to the driver. There were two women and children in the back seat. The customs authorities found raw opium hidden behind the back rest of the rear seat of the car. The evidence showed that the second appellant had borrowed the car from the owner and had been using it from the 13th August 1977 to 15th August 1977, when the car was stopped and searched by the customs authorities. The first appellant was a mere driver who was asked to drive the car. The appellants were convicted for trafficking in dangerous drugs and sentenced to life imprisonment plus six strokes of rotan each. They appealed against their conviction.

Held: (1) in this case the presumption under paragraph (d) of section 37 of the Dangerous Drugs Act has no application because the car in which the opium was found could not be held to be "anything whatsoever containing" the dangerous drug;

(2) the presumption under paragraph (h) of section 37 of the Act has no application because the opium was not found in any specially constructed compartment of the vehicle;

(3) the presumption under paragraph (g) of section 37 of the Act did not apply as the motor car did not constitute "premises" within the meaning of the Act;

(4) the circumstances in this case including the fact that second appellant lied about the purpose of borrowing the car showed that the second appellant knew that the raw opium was concealed in the car and so possession was proved against him. His conviction and sentence should therefore be maintained;

(5) in this case the false statement by the second appellant concerning the surrounding circumstances in which the offence was committed whilst he had an opportunity to commit the offence could be regarded as corroboration of the evidence against him;

(6) there was no evidence against the first appellant except that he was a mere driver and therefore his appeal must be allowed.

Cases referred to:-

(1) *Tong Peng Hong* v. *Public Prosecutor* [1955] M.L.J. 232.

(2) *Public Prosecutor* v. *Ho Cheong Beng* [1950] M.L.J. 235.

(3) *Choo Teck Soon* v. *Public Prosecutor* [1954] M.L.J. 63.

(4) *Eade* v. *The King* (1924) 34 C.L.R. 154.

(5) *Regina* v. *Lucas (Ruth)* [1981] 3 W.L.R. 120.

(6) *R.* v. *Tripodi* (1961) V.R. 186; [1961] A.L.R. 780.

FEDERAL COURT.

P.K. Nathan (*R.K. Menon* with him) for the appellants.

Shaikh Daud bin Ismail (Deputy Public Prosecutor) for the respondent.

Salleh Abas F.J. (delivering the judgment of the Court): The two appellants in this appeal were convicted by Yusoff Mohamed J. for trafficking in dangerous drugs, i.e. 20.27 kilograms of raw opium, which is an offence under section 39B(1)(a) of Dangerous Drugs Act and punishable under subsection (2) of the same section of the Act. They were sentenced to life imprisonment plus six strokes of rotan each. The appellants appeal to us against conviction only. The facts are not much disputed and can be briefly stated as follows.

A motor car bearing registration number JM 2944 came under the surveillance of Customs authorities since July 5, 1977 as a result of information received that the car was suspected of being used to carry drugs to Johore Bharu. The Customs authorities laid three unsuccessful ambushes against the car on July 5, 9 and 25, 1977 at Johore Causeway. Nothing happened in any of these ambushes. Finally on August 15, 1977 on receipt of further information another ambush was laid. At about 11.15 a.m. on that date this car was seen near Tasek Golf Club to be proceeding towards Johore Causeway. PW5 Mohd. Tahir bin Ismail, P.K.P. 2043 who took up an ambush position at Jalan Larkin followed the car in his car and overtook it at the Causeway where it was stopped. At the steering wheel was Appellant No. (1) whilst Appellant No. (2) was sitting in the front seat next to the driver. In the back seat there were two women, one of whom (PW2) was the wife of Appellant No. (1) and the other (PW3) the fiancee of Appellant No. (2). There were also two children in the back seat. Having identified himself to Appellant No. (1) that he was a Customs Officer PW5 asked Appellant No. (2) if he was carrying anything in the car. The reply was that there were some chempedak fruits and rambutans in the luggage boot of the car. Upon opening the luggage boot three chempedak fruits which emitted very strong smell and one bunch of rambutans were found in it. On further search 10 packets of raw opium weighing 20.27 kilograms were found hidden behind the back rest of the rear seat of the car. The search was conducted in the presence of both appellants and assisting PW5 to carry out the search were two other Customs Officers, namely PW6 and PW7 who both took part in the ambush. On being questioned about the opium both the appellants denied having any knowledge of it. Finally they were arrested and charged for the offence and were subsequently convicted.

To prove an offence of trafficking under section 37(B)(1)(a) the prosecution has to rely on statutory presumptions under section 37 of the Act. Paragraph (da) of this section says:

> "Any person who is found in possession of..... 5 kilogrammes of raw opium.....shall be presumed, until the contrary is proved, to be trafficking in the said drug."

In this case there is no dispute that the weight of the raw opium found in the car is more than what is required by this paragraph. If possession is proved against both the appellants they would be guilty of trafficking. The question, therefore, is whether the appellants were in possession of the opium at the material time and place when the Customs Officers searched the car. One of the elements to constitute possession is knowledge which means that the prosecution must prove that the appellants knew of the existence of the opium hidden behind the back rest of the car's rear seat. In holding that the appellants

had the necessary knowledge, the learned judge in the court below accepted the prosecution's submission that not only could the statutory presumption in paragraph (g) of section 37 be invoked but that also the circumstances of the case show that the appellants actually knew of the opium being hidden in the car.

There are three presumptions which could possibly be invoked. These are presumptions in paragraphs (d), (g) and (h). The presumption under paragraph (d) says: —

"Any person who is found to have had in his custody or under his control *anything whatsoever* containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug."

In our view this presumption has no application in the present appeal because the car in which the opium was found cannot be held to be *"anything whatsoever"* within the meaning of paragraph (d). This expression "anything whatsoever" may appear to have a wide import, but its scope and extent is limited by the word "containing" which qualifies it. A car cannot be said to contain drugs nor could it be said to be a container of drugs although opium was found in it. To hold that the car contains drugs would be, in our view, to twist and overstretch the language beyond its common usage. Thomson J., as he then was, in *Tong Peng Hong* v. *Public Prosecutor*[1] made a thorough analysis of the scope and application of the presumption under paragraph (d). It is sufficient for us here to refer to that part of the judgment where he said: "Both by derivation and by ordinary usage the word 'containing' implies some measure of holding or restriction" or, if we may add, some measure of confinement. That being the case the presumption under paragraph (d) is irrelevant.

The next presumption is one under paragraph (h) of section 37 which says:

"if any dangerous drug is found *concealed in any compartment, specially constructed for the purpose, on any vehicle,* it shall until the contrary is proved, be deemed to have been so concealed with the knowledge of the owner of the vehicle and of the person in charge of the vehicle for the time being."

The prosecution conceded before us that the presumption under this paragraph has no application to the present appeal because the opium was not found in a specially constructed compartment though it was found hidden or concealed behind the back rest of the rear seat of the car and although the Customs Officers testified that the opium could not be discovered by a rough search of the car nor could it be seen through the boot of the car. As they all testified that there was no specially constructed compartment in the car, coupled with the concession by the prosecution, we agree that there is no point of proceeding any further on this presumption.

The only presumption relied upon by the prosecution and accepted by the court below is the presumption under paragraph (g) which says:

"if any dangerous drug is found to be concealed in any *premises,* it shall be presumed, until the contrary is proved, that the said drug is so concealed with the knowledge of the *occupier of the premises.*"

Counsel for the appellants argued strenuously that the word *"premises"* does not include a motor car. Hence this presumption does not arise. He relied upon the decision of Abbott J. in *Public Prosecutor* v. *Ho Cheong Beng,*[2] and that of Wilson J. in *Choo Teck Soon* v. *Public Prosecutor.*[3] In *Ho Cheong Beng's* case the respondent was acquitted of a charge of possession of opium under section 3(1) of the BMA Opium and Chandu Proclamation. Under section 3(2) of the Proclamation any opium found on any part of the premises was deemed to be in the possession of the occupier of such part of the said premises. The opium which was the subject matter of the charge was found hidden in a cement bag containing cement which was carried in the boot of the car. Abbott J. held that the car was not a premises and that therefore no presumption arose against the respondent who was the driver of the car. Admittedly the Proclamation did not define the word "premises". In *Choo Teck Soon's* case the appellant was convicted of being in possession of raw opium under section 6 of the present Dangerous Drugs Act. The opium was found to be contained in a tin which itself was discovered in the luggage boot of the car. In obvious reference to the applicability of the presumption under paragraph (g) of section 37, Wilson J. said:

"In this case the drug was found in the motor car and I am satisfied that the motor car does not constitute premises within the meaning of the Dangerous Drugs Ordinance."

The learned judge in the court below in the present appeal refused to accept *Choo Teck Soon's* case as good law because Wilson J. gave no reason for his decision as to why in his view the car could not be held to be premises within the meaning of the Dangerous Drugs Ordinance in view of the definition of this word in section 2. He therefore held that the statutory presumption under paragraph (g) of section 37 applied. Shaikh Daud, Senior Federal Counsel, appearing for the Public Prosecutor argued before us that the presumption under paragraph (g) could be invoked by the prosecution because the word "premises" appearing therein by virtue of its definition in section 2 of the Act must have included a motor car. The word "premises" is defined by section 2 to include any "conveyance" and the same section also defines the word "conveyance" to include:

"ship, train, *vehicle,* aircraft or *any other means of transport* by which goods can be carried."

As a motor car is either "conveyance" or "any other means of transport" Shaikh Daud submitted that a motor car must be within the definition of "premises". It is true that Wilson J. in *Choo Teck Soon's* case did not give reasons for his view in holding that a motor car is not "premises" but we think that his view is correct. In the first place the definition contained in section 2 of the Act including those of the words "premises" and "conveyance" are not intended to carry those defined meanings for all times and places irrespective of the context in which they appear because it is clear that the definitions are all made subject to the expression "In this ordinance, unless the context otherwise requires". Thus where the context appears to have intended a meaning different from that assigned by the definition, the meaning given by section 2 will not be applicable. In the second place the word "premises" in paragraph (g) of section

37 is further restricted by the phrase "occupier of the said premises" appearing in the same paragraph. Whilst we may speak of a person in possession of a house, or a place or a premises as an "occupier" thereof, it is against common usage that any person in control of a motor car is referred to as an occupier of it, although he may properly be described as being in possession of the motor car. The use of the words "occupier of the premises" instead of the words "person in possession of the premises" in paragraph (g) of section 37 must have been attributable to the intention of the legislature to restrict the definition of "premises" to its usual and ordinary meaning as understood in common usage and not to give an extended meaning thereto so as to include a motor car. In the third place to read the word "motor car" or "vehicle" into the word "premises" in paragraph (g) is not justified in view of the fact that the subsequent paragraph, i.e. paragraph (h) clearly and specially relates to the presumption arising out of the use of a vehicle. Thus we agree with counsel's submission that the presumption under paragraph (g) does not apply.

Having held that the prosecution cannot rely on any of these presumptions, we now have to turn our attention to the examination of the rest of the evidence to find out whether there are circumstances which show that both the appellants or one of them had the necessary knowledge concerning the opium in question so as to constitute possession.

It is established that the car did not belong to the appellants but belonged to one Syed Abdul Rahman bin Ahmad (PW4). He lent it to Appellant No. (2) who came to his house at about 8.00 p.m. on August 13, 1977 saying that he needed the car in order to go to Trengganu for his business. He drove the car away and the next morning, i.e. on August 14, 1977 he drove it to Appellant No. (1)'s house accompanied by his fiancee (PW3). Appellant No. (2) and Appellant No. (1) are brothers. Instead of going to Trengganu as he represented to PW4 to be the purpose of borrowing the car, he asked Appellant No. (1) to come with him to Singapore. So a party consisting of both the appellants, the two women (PW2 and PW3) and four children of Appellant No. (1) made a trip to Singapore. Appellant No. (1) was driving the car. On returning from Singapore in the same evening Appellant No. (2) went again to PW4's house and asked him for permission to use the car until the next day, i.e. August 15, 1977 because he said he wanted to do shopping in Singapore. Permission was granted. That night Appellant No. (2) and his fiancee PW3 did not return to their houses but spent the night in Appellant No. (1)'s house. The next day i.e. on August 15, 1977 the same party with two children instead of four as in the previous trip made a second trip to Singapore. They set out from Batu Pahat at about 9.00 a.m. stopping at Kulai and later at Ayer Hitam to buy chempedak fruits and rambutans. On approaching Johore Causeway they were followed by PW5 who finally stopped them at the Causeway, where upon a search made of the car the opium in question was found. From this evidence it is clear that Appellant No. (2) had control and custody of the car from 8 00 p.m. on August 13, 1977 to 11.45 a.m. on August 15, 1977 when his second trip to Singapore ended at Johore Causeway. Appellant No. (1) was a mere driver who was asked to drive the car. It was Appellant No. (2) who borrowed the car from PW4 and it was he who told PW4 that he wanted to use the car for a trip to Trengganu, and it was Appellant No. (2) also who asked PW4 for permission to use the car for another day to go to Singapore for shopping. The second permission was completely unnecessary in view of the fact that he was allowed to keep the car for two days and that so far he had only used it for one day. He still had another day to use the car.

Counsel for the appellants submitted to us that the opium in question might have already been in the car when it was lent by PW4 to Appellant No. (2) at about 8.00 p.m. on August 13, 1977, because — he submitted — PW4 had admitted lending the car to his neighbours previously. Now let us examine the evidence as to the custody and control of the car in a period of two months before it was lent to Appellant No. (2). PW4 testified that he could not say definitely whether Appellant No. (2) had borrowed his car during this period although, he said, Appellant No. (2) did borrow it 4 to 5 times in 1977. He also testified that he had lent it to 5 or 6 persons who were all his neighbours during this period for wedding purposes only. He could not remember, however, whether the car was lent to any one on the three dates, i.e. July 5, 9 and 25 when the Customs authorities mounted the unsuccessful ambushes on the car. Be as it may, it is clear that during this period only 5 or 6 persons other than Appellant No. (2) borrowed and used the car, and it is equally clear that the borrowers were using it for wedding purposes only. Assuming that Appellant No. (2) did not borrow the car during this period, it only means that except on those occasions, when it was lent for wedding purposes the car was all the time in the control and custody of the owner, PW4. It remained so until on the evening of August 13, 1977 when it was lent to Appellant No. (2). There is absolutely no evidence that a week or two weeks immediately preceding that date the car was not in the possession of PW4.

That being the case who could have placed the opium in question behind the back rest of the rear seat of the car? In our view it is completely preposterous even to suggest that PW4's neighbours to whom he lent the car did it. There is no evidence at all to that effect. The quantity of opium found in the car was not small but 20.27 kilograms. If any of his neighbours took the trouble to hide this opium in the car one would expect this person — whoever he may be — to make use of the car and not let PW4 lend it to someone else or to Appellant No. (2). We cannot accept that the car was intended by 'this person' to be a mere store-house for opium. Such a course of action is so dangerous that it is highly unlikely. If the neighbours did not place the opium there, could it be placed by PW4 himself? Here there is not only no evidence to that effect but also no suggestion was ever made by the appellants or their counsel. PW4 said that on August 13, 1977 he used the car to go to the market. He locked the car when he left it in the market car park. An hour later he

came back to the car and drove it home. He noticed nothing unusual about the car nor did he smell any unusual odour in or around the car. The car was in his possession on that day until evening when he lent it to Appellant No. (2).

Thus our analysis of the evidence leads us to an irresistable conclusion that the opium must have been placed in the car during the two day period when it was in the custody of Appellant No. (2). We cannot accept counsel's submission that the opium in question could have already been in the car when it was lent to Appellant No. (2). The fact that the car came under Customs surveillance is neither here nor there. This could not be an evidence to show that the opium in question was already in it. Further having regard to the quantity of opium found and the place where it was hidden in the car we think that whoever did the job must have expended a good deal of effort and time to conceal the opium there. The concealment could not be done momentarily nor hurriedly but in a longer period of time allowing for a proper planning and timing. Only a person who had a longer time to use the car could have the opportunity to execute this clever job.

Apart from the fact that Appellant No. (2) had possession and control of the car during the relevant period, i.e. between the evening of August 13 and forenoon of August 15, 1977 and the fact that he had opportunity to conceal the opium in the car during the period, there are two other circumstances which go to show that Appellant No. (2) had the necessary knowledge. We recall that he told PW4 that the purpose of borrowing the car was to go to Trengganu. This was a deliberate lie as he never intended to go to Trengganu at all but to Singapore, which he did. We also recall that he told PW4 that he needed the car for two days. And as such there was no reason at all for him to see PW4 again in the evening of August 14 for permission to use it further on August 15. Such permission was already given to him. In other jurisdictions a false statement made by an accused person concerning the surrounding circumstances in which an offence was committed whilst he had an opportunity to commit the offence can be regarded as a corroboration of the evidence against him. *Eade* v. *The King*[4] and also *Regina* v. *Lucas (Ruth)*.[5] We accept the decisions in these cases to be good law. In this case we hold that the representation he made to PW4 regarding the purpose of borrowing the car was a deliberate lie and is therefore a corroborative evidence against him for which he must explain. Such lie is a reflection of his consciousness of guilt as regards the use he intended to make of the car in question.

The other material circumstance is the purchase of chempedak fruits which the Customs officers found to have emitted very strong odour. The chempedak fruits were purchased by Appellant No. (2), whilst the rambutans and some sweet potatoes were bought by Appellant No. (1). All these were bought at Ayer Hitam and they were all intended as gifts to their sister who lives in Singapore. The learned judge in the court below took judicial notice of the fact that raw opium emitted out very strong disagreeable smell and thus drew an inference that the chempedaks were in reality intended by Appellant No. (2) to camouflage the odour of the opium. For ourselves having regard to the common course of natural events and human conduct we cannot find fault with such inference. Thus the purchase of the chempedaks was in reality for a different purpose, although outwardly it appeared to be innocent as it was professedly intended as a gift to his sister in Singapore and only Appellant No. (2) knew what that different purpose was.

In conclusion the totality of these circumstances — i.e. the custody and control of the car, the opportunity of Appellant No. (2) who had custody and control of it during the material period to conceal the raw opium in question in the car, the lies which he told to PW4 about the purpose of borrowing the car for that period and lastly the purpose which could be drawn from the purchase of the chempedaks with such a strong odour — all these circumstances lead us to an irresistible conclusion that Appellant No. (2) knew that the raw opium in question was concealed in the car and so possession was proved against him. Nothing said by him in his defence could alter this conclusion. We therefore hold that his conviction and sentence should be maintained.

As regards Appellant No. (1), there is no evidence against him other than that he was a mere driver. He did not borrow the car. He did not invite Appellant No. (2) to come and spend the night in his house on August 14. It was not his idea that they all went to Singapore on August 14 and 15. He and his family joined Appellant No. (2) on the two trips to Singapore because he was required to drive the car as he had a valid driving licence, whereas Appellant No. (2), though knowing how to drive and capable of driving it had no valid driving licence because he had lost it and had not asked for the replacement. Thus in the circumstances of the case we are of the view that the conviction and sentence of Appellant No. (1) are not supported by evidence and should therefore be quashed.

Finally we allow the appeal of Appellant No. (1) and order that his conviction and sentence be quashed, but we dismiss the appeal of Appellant No. (2) and order that his sentence and conviction do stand.

Order accordingly.

Solicitors: *R.K. Menon & Co.*

PUBLIC PROSECUTOR v. CHU BEOW HIN

[F.C. (Raja Azlan Shah Ag. L.P., Salleh Abas & Abdul Hamid F.JJ.) September 22 & October 14, 1981]

[Kuala Lumpur — Federal Court Criminal Appeal No. 32 of 1977]

Criminal Law and Procedure — Forfeiture — Offences under Price Control Act, 1946 — Failure to affix tags on cloths — Goods seized — Whether order for forfeiture of goods can be made — Price Control Act, 1946, ss. 14 & 22(1).

Price Control — Failure to affix tag — Effect of.

In this case the respondent had pleaded guilty to a charge under section 22(1) of the Price Control Act, 1946 for failing to affix tags on his goods, that is clothes. He was fined $5,000 and the learned President ordered the goods seized to